

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RULED IN THIS
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

CIVIL NO: _____

JUL 13 2007 AG

MOTION UNDER 28 U.S.C. SECTION 2255,
TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A
PERSON IN FEDERAL CUSTODY

at 11 o'clock and 15 min. AM
SUE BEITIA, CLERK

UNITED STATES OF AMERICA

FCI BIG SPRING
1900 SIMLER AVENUE, BIG SPRING, TX
PLACE OF CONFINEMENT 79720

vs.

90291-02; SS3 Unit

PRISONER ID NUMBER

ERNEST M. ESPARZA

03-00127SOM

MOVANT (Full name of movant)

CRIMINAL CASE NUMBER

(If movant has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

INSTRUCTIONS - READ CAREFULLY

1. This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.
2. Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
3. Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

⊕ 711 B.

4. If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration provided with this motion, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
5. Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgement.
6. Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.
7. When the motion is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court for the Hawaii at the appropriate divisional office whose address is:

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
OFFICE OF THE CLERK
300 ALA MOANA BOULEVARD, C-338
P.O. BOX 50129
HONOLULU, HAWAII 96850-0338

Before Honorable Susan Oki Mollway,
United States District Court Judge.
808-541-1720 (Judge)
808-541-1300 (Clerk, Walter A.Y.H. Chinn).

8. Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack:
U.S. District Court for Hawaii, see page 2 herebefore.
2. Date of judgment of conviction: May 20, 2005
3. Length of sentence: 168 month for Counts 1 & 5, run concurrently, and 60 months for Count 4, run consecutively to Count 1.
4. Nature of offense involved (all counts):

COUNT 1: Conspiracy to distribute and possess w/intent to distribute, in excess of 50 grams of methamphetamine, under 21 USC § 846, 841(a)(1) and 841(b)(1)(A); possession of firearm during and in relation to drug trafficking crime, under 18 USC § 924(c)(1)(A)(i), COUNT 4, and unlawful user in possession of a firearm, under 18 USC §§ 922(g)(3) and 924(a)(2), COUNT 5.
of a 12 Count third Superseding Indictment.

5. What was your plea? (Check one)

Not Guilty Guilty Nolo contendere

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

Other Counts belong to Defendant's co-conspirators

6. Kind of trial: (Check one) Jury Judge Only
7. Did you testify at the trial? Yes No
8. Did you appeal from the judgment of conviction? Yes No
9. If you did appeal, answer the following:

Name of Court: U.S. Court of Appeals, Ninth Circuit

Result: Held waiver was voluntary, action dismissed.

Date of result: April 11, 2006, Memorandum; Judgment, May 05, 2006

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes No

11. If your answer to 10 was "Yes" give the following information:

Name of Court: N/A

Nature of proceeding: N/A

Grounds raised: N/A

Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

Result: N/A

Date of Result: N/A

As to any *second* petition, application or motion, give the same information:

Name of Court: N/A

Nature of proceeding: N/A

Grounds raised: N/A

Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

Result: N/A

Date of Result: N/A

As to any *third* petition, application or motion, give the same information:

Name of Court: N/A

Nature of proceeding: N/A

Grounds raised: N/A

Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

Result: N/A

Date of Result: N/A

Did you appeal to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion.

First petition, etc. Yes No

Second petition, etc. Yes No

Third petition, etc. Yes No

If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

No certiorari was taken, no rehearing was taken, because counsel advised against it.

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed. However, you should raise in this petition all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

DO NOT CHECK ANY OF THESE LISTED GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right to appeal.

- A. Ground One: Counsel was Ineffective by Allowing The Court to Enhance Petitioner Above The Statutory Maximum Allowed By Law.

Supporting FACTS (tell your story briefly without citing cases or law):

See Memorandum of claims hereto.

- B. Ground Two: Counsel was Ineffective for Failing to Investigate the Law and Facts.

Supporting FACTS (tell your story briefly without citing cases or law):

See Memorandum of claims hereto.

- C. Ground Three: _____

Supporting FACTS (tell your story briefly without citing cases or law):

D. Ground Four: _____

Supporting FACTS (tell your story briefly without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them:

I contend the reason for not raising the claims is because of ineffective assistance of appellate counsel, and because no alternate attorney was appointed for appeal, the claims of ineffectiveness, or issues were raised by the same attorney whom ineffectiveness is alleged against, and would not raise his own ineffectiveness.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes No

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: Arthur Ross, 126 Queen St., Ste. 210
Honolulu, Hawaii 96813, 808/521.4343, Attorney

(b) At arraignment and plea: Same as 15(a) above

(c) At trial: N/A

(d) At sentencing: Same as 15(a) above

(e) On appeal: Same as 15(a) above

(f) In any post-conviction proceeding: Pro se, this action

(g) On appeal from any adverse ruling in a post-conviction proceeding:

N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes No (Pled guilty to Counts 1, 4 and 5 of information)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes No Consecutive sentence on Count 4, to Count 1, on this same case.

- (a) If so, give name and location of court which imposed sentence to be served in the future:

Same case, same sentence, part run consecutive.

- (b) And give date and length of sentence to be served in the future:

60 months as to Count 4, be served consecutively
to Count 1.

- (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes No (same case, same sentence)

Wherefore, movant prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Ernest M. Esparza

Signature of Attorney (if any)

ERNEST M. ESPARZA

90291-022; SS3-24L

Federal Correctional Institution

Firm Name

1900 Simler Avenue

Address

Big Spring, Texas 79720

City, State & Zip Code

N/A

Telephone (including area code)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on June 9, 2007 (date).

Ernest M. Esparza

Signature of Movant